88-876

No. _____

Supreme Court, U.S.
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CLERK

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1988

VAIL VILLAGE INN ASSOCIATES, a Colorado partnership, d/b/a Village Inn Plaza; COWPERTHWAITE-VAIL, LTD., a Colorado limited partnership; JAMES COWPERTHWAITE; CHARLES H. COWPERTHWAITE; ROBERT E. BARRETT and G. RICHARD KATZENBACH,
Petitioners,

v.

MANUEL BENET GIRALT, a/k/a MANUEL BENET,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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QUESTIONS PRESENTED

1. Did Congress envision that the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701 et seq. ("Act"), apply to the sale or lease of virtually any interest in real estate that includes the right to exclusive use?

2. Did the Colorado Court of Appeals err when it enlarged the scope of the Act to apply to petitioners' parking spaces?

3. Did the Trial Judge's refusal to withdraw from the case, in light of his secret knowledge of a possible bias, violate petitioners' Fourteenth Amendment rights to due process?

PARTIES TO PROCEEDINGS BELOW

The only parties to this proceeding in the Court below are those indicated by the caption of this case.

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OPINIONS BELOW

The opinion of the Colorado Court of Appeals, which petitioners seek to have reviewed by this Court, is reported at 759 P.2d 801 (Colo. App. 1988).

JURISDICTIONAL GROUNDS

A. The judgment of the Colorado Court of Appeals sought to be reviewed by petitioners was entered on March 31, 1988. The Court of Appeals denied petitioner's Petition for Rehearing on April 28, 1988.

B. The Colorado Supreme Court denied petitioners' Petition for Writ of Certiorari on August 29, 1988. Petitioners' instant Petition is being filed within 90 days of August 29, 1988.

C. Jurisdiction of this Court to review the judgment of the Colorado Court of Appeals is conferred by 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

CONSTITUTIONAL PROVISIONS:

United States Constitution, Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Colorado Constitution, Article VI, Section 23: The pertinent text of this constitutional provision is fully set forth in the appendix.

STATUTES:

Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1703: The pertinent text of this statute is fully set forth in the appendix.

Colorado Condominium Ownership Act, C.R.S. § 38-33-103: The pertinent text of this statute is fully set forth in the appendix.

Judicial Disciplinary Hearings, C.R.S. §§ 24-72-401, 402: The pertinent text of this statute is fully set forth in the appendix.

Colorado Rules of Judicial Discipline, Rule 6: The pertinent text of this rule is fully set forth in the appendix.

REGULATIONS:

24 C.F.R. § 1710.1:

Definitions:

> "'Lot' means any portion, piece, division, unit or undivided interest in land located in any state or foreign country if the interest includes the right to the exclusive use of a specific portion of the land."

STATEMENT OF THE CASE

On August 3, 1983, respondent brought this action in Eagle County, Colorado District Court ("Trial Court") seeking to recover a total of $185,000 in deposits on two condominium units in petitioners' Village Inn Plaza project ("Project") in Vail, Colorado. The Project consists of 29 residential units, 4 commercial units and 107 parking spaces. On August 21, 1984, respondent filed a Motion for Partial Summary Judgment to void the purchase agreements and recover his deposits, pursuant to the Act. At issue was the applicability of the Act's reporting and disclosure requirements to the Project. 15 U.S.C. §§ 1702 (a).

On January 9, 1985, the Trial Court considered the motion, immediately decided in favor of respondent, entered its order and declared the partial summary judgment dispositive of all claims. The Trial Court ruled that the Act did

apply to the Project, ordered rescission of the purchase agreements and reimbursement of respondent's deposits, plus interest. On March 14, 1985, the Trial Court denied petitioners' Motion for Reconsideration and entered its final order.

Petitioners then filed their appeal to the Colorado Court of Appeals ("Court of Appeals"). Later, petitioners filed a Motion to Remand to the District Court for consideration of their Motion for Relief from Judgment and Disqualification of Judge, which the Court of Appeals first denied and later granted on March 16, 1987. On remand, the Trial Court denied the Motion for Relief from Judgment and Disqualification of Judge and reaffirmed its previous decision. The Court of Appeals affirmed the decision of the Trial Court on March 31, 1988 and denied petitioners' Petition for Rehearing on April 28, 1988.

Petitioners filed their Petition for Writ of Certiorari with the Colorado Supreme Court on May 31, 1988. That court denied petitioners' writ

on August 29, 1988. On September 20, 1988, the Court of Appeals issued a Stay of its Mandate in the matter, pending a resolution by this Court of petitioners' Petition for Writ of Certiorari.

Federal questions raised in state courts below:

a. Whether or not the Act applies to the Project has been contested throughout the proceedings below. The question was raised in the pleadings, Motion for Summary Judgment, briefs and oral argument before the Court of Appeals, and in petitioners' Petition for Writ of Certiorari to the Colorado Supreme Court. The Trial Court and the Court of Appeals determined that the Act applied to the Project and the Colorado Supreme Court denied certiorari.

b. The issue of the Trial Judge's possible bias against the petitioners was raised on a Motion for Remand directed to the Court of Appeals immediately after petitioners first learned of the judge's inherent conflict. The issue was considered

by the Trial Court on petitioners' Motion for Relief from Judgment and for Disqualification of Judge and denied. On appeal, the disqualification issue was briefed and argued before the Court of Appeals and included in petitioners' Petition for Writ of Certiorari to the Colorado Supreme Court. The Court of Appeals rejected petitioners' claim and the Colorado Supreme Court denied certiorari.

REASONS FOR GRANTING THE PETITION

I. THE PROJECT DOES NOT COME WITHIN THE PURPOSE OR SCOPE OF THE ACT, SINCE CONGRESS NEVER INTENDED THAT IT APPLY TO THE SALE OR LEASE OF VIRTUALLY ALL INTERESTS IN REAL ESTATE THAT INCLUDE THE RIGHT TO EXCLUSIVE USE.

This case gives the Court an opportunity to restore sanity to the application and scope of an important federal statute. The Court of Appeals has authored the most radical, wildly unprecedented expansion of the Act to date. If sustained, virtually every transaction involving the sale or lease of real property will be drawn into the maelstrom of the Act. Apartment complexes, hotels and motels, mini-warehouse projects, and parking garages, to name but a few -- all would be potentially subject to

the Act's reporting and disclosure requirements and penalty provisions. Any recent real estate development involving the sale or lease of one hundred or more discrete units of property under a common marketing scheme are suddenly vulnerable.

Absolutely no support or authority exists to support this quantum leap the Court of Appeals has taken in broadening the Act's scope and reach.

A brief review of the Act's legislative history will put the Court of Appeals' decision in perspective.

Beginning with hearings before the Senate Special Committee on Aging, the Senate determined that the burgeoning interstate land sales industry contained a disreputable element which was exploiting purchasers, particularly elderly purchasers. Powell, Powell on Real Property, Volume 5, ¶ 758.1 (1988) ("Powell"). Congress recognized that the sale of undeveloped subdivided land in resort and retirement areas had become a

major business. Persuaded that this business had attracted some large scale, "get rich quick" promoters, Congress enacted the Act to protect the consumer from overreaching and sharp practices. Id.

Congress was particularly concerned with widespread abuses where purchasers unknowingly bought land in swamps, deserts and the like. Id. In such cases, unwary purchasers' dreams of second homes, retirement sites or speculative gain were often shattered and their investments lost. Hearings on S.B. 2672 before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 89th Congress, 2d Session 2 (1966) ("1966 Hearings").

Congress also meant to address the sales methods employed by some developers. Powell, Volume 5, ¶ 758.2[1]. The widespread use of sight-unseen sales techniques was a particularly disturbing aspect of the marketing process. Second-hand descriptions, half-truths, omissions

and outright lies were deemed significant problems. 1966 Hearings, supra.

In short, the general purpose of the Act was to prohibit and punish fraud in land development enterprises. McCown v. Heidler, 527 F.2d 204 (10th Cir. 1975). The underlying purpose of the Act was to ensure that a buyer, prior to purchasing certain kinds of undeveloped real estate, was provided facts which would enable him to make an informed decision about purchasing the property. Law v. Royal Palm Beach Colony, Inc., 578 F.2d 98 (5th Cir. 1978).

The present case does not involve the sale of "swamp land" to an unwary purchaser. Rather, it involves the sale of two luxury condominium units in a world famous Colorado ski resort to a sophisticated and wealthy foreign investor who personally inspected and was well acquainted with the Project, which was well under construction when the original purchase agreements were entered into. The property is not swamp land and

respondent stands in stark contrast to the vulnerable, unwary purchaser with whom Congress was concerned.

More recently, several courts have held that condominiums are "lots" for purposes of the Act, thus changing a statute originally intended to regulate the interstate sale of undeveloped, subdivided land, to one which regulates the sale of condominiums. Winter v. Hollingsworth Properties, Inc., 777 F.2d 1444 (11th Cir. 1984).

During the entire course of the present litigation, petitioners have contested the application of the Act to condominiums. They have argued that the Act is concerned with "the sale or lease of lots in a subdivision," 15 U.S.C. § 1702 (a) (1); § 1702 (b) (1)-(5), and that those "lots" should be given their common meaning. "Words in a statute are to be given their plain and ordinary meaning." Jones v. Hanley Dawson Cadillac Co. 848 F. 2d 803, 807 (7th Cir. 1988). Black's Law Dictionary defines "lot" as "[a]ny portion, piece, division or

parcel of land," Black's Law Dictionary 853 (Revised Fifth Edition 1979). (Emphasis added.) The title of the Act itself is indicative of the fact that it was aimed at regulating interstate land sales activities.[1] Thus, both the Act and the common meaning of the word "lot" indicate that it refers to land, not improved real property.

Even if condominiums are "lots" for purposes of the Act, petitioners' parking spaces are not condominiums in any event. This question is vital here because the Act exempts developments of less than 100 lots. 15 U.S.C. § 1702 (b) (1). The

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[1] Congress described the problem as follows:

> Purchasers living in the same state where the land was located or living out of state were persuaded to buy land that they had never seen by sophisticated sales forces promising that [the] land (which might be under water or suitable only for grazing purposes) was a good investment, suitable for homesites and easily resalable. (Emphasis added.) H.R. Rep. No. 154, 96th Cong., 1st Sess. 30,31 reprinted in 1979 U.S. Code Cong. & Admin. News 2317, 2346.

Project contains a total of 140 units. The parties agree that 33 of the units are condominiums. But what about the 107 parking spaces?

When petitioners were completing construction of the Project, they were obliged to convey a block of fifty parking spaces situated in a large, open underground garage to the former owner of the land to make up for surface parking lost when the improvements were built. In order to effect the conveyance, petitioners attempted to condominimize the parking spaces so that fee simple title could pass. As was done by developers of many other similar projects in Vail, petitioners listed them in the Project's condominium declaration.

But Colorado law does not permit this. The Colorado Condominium Act requires that condominiums consist of an "enclosed room or rooms." C.R.S. § 38-33-103. Indeed, a proposal introduced several years ago in the Colorado legislature and supported by the mobile home

industry would have expanded the definition of condominiums to include real estate without enclosed rooms, but the proposal did not pass. H.B. 1081, 54th Colorado General Assembly, 1st Reg. Sess. (1983). Thus, the parking spaces are not and cannot be condominiums. Indeed, one of respondent's original claims for relief urged that the parking spaces are neither condominiums nor merchantable as such. (Complaint ¶ 13)

In their briefs before the Court of Appeals, petitioners emphasized that their parking spaces were not condominiums and could not count as "lots" for the purposes of the Act, thus qualifying their Project for the 100 lot exemption.

Then comes the Court of Appeals with its astounding, unprecedented finding: "It is irrelevant whether the parking units are condominiums pursuant to Colorado law." Giralt v. Vail Village Inn Associates, 759 P.2d 801, 807-808 (Colo. App. 1988). The parking spaces are lots for the purposes of the Act since they "are interests in real estate and

a form of ownership of space to which the owners have the right to exclusive use . . . ." Id.

This was pure evasion. The legal status of the parking spaces could not be more relevant and the Court of Appeals was irresponsible to suggest otherwise. Because they cannot be condominiums, it is likely that the parking spaces revert to being general common elements, as at least one court has held in analogous circumstances. Daytona Development Corporation v. Bergquist 308 So. 2d 548, 549 (Fla. App. 1975) In their present form, it is extremely doubtful they are valid interests in real estate and a form of ownership conveying rights to exclusive use. The American real estate industry depends on precise and well understood definitions of the various types of real property and the kinds of interests people can have in them. It simply won't do to leave such interests, including the Project's parking spaces, in legal limbo.

As long as the legal status of these parking spaces remains unsettled, it is indisputable that they

are not marketable under Colorado law, cannot be individually sold or leased, and thus cannot be "lots" within the meaning of the Act. The Court of Appeals' decision to apply the Act to parking spaces, whether or not they are condominiums, is contrary to the Act's language and relevant Colorado law. 759 P.2d at 807.

The Act's express provisions clearly apply only to the "sale or lease of lots." 15 U.S.C. § 1703 (a). At the very least, the Court of Appeals should have acknowledged that the legal status of the parking spaces was a material question which should have made the Trial Court's summary judgment inappropriate.

The Court of Appeals' unprecedented extension of the Act's reach, if left undisturbed by this Court, will create great confusion, consternation and unwarranted expense involved in complying with the Act's reporting and disclosure requirements. Even small developers and business people would risk liability under the Act as a

consequence of how parking spaces, heretofore mere stripes of paint on pavement, are described and perhaps assigned for exclusive use. Leasehold interests, small commercial developments, and the like, are potentially included, depending only on the fortuity of whether and how many spaces in an adjoining parking lot are allocated for individual use. This result truly is far afield from Congress' original intent to curtail the fraudulent sale of undeveloped or semi-developed land. H.R. Rep. No. 154, 96th Cong., 1st Sess. 30, 31 reprinted in 1979 U.S. Code Cong. & Admin. News 2317, 2346.

The breadth of the Court of Appeal's holding is breathtaking for its expansive, almost unlimited scope: any interest in real estate, as long as it includes the right to exclusive use, is within the ambit of the Act. No other reported decision anywhere has taken the Act to such absurd limits--and herein lies the true violence done to the statute by its decision. The Court of Appeal's reasoning and holding stands in total isolation, unable to

withstand fair-minded scrutiny. This Court should not acquiesce in this example of unjustified and unwarranted judicial legislation.

II. THE TRIAL JUDGE'S REFUSAL TO DISQUALIFY HIMSELF, IN THE FACE OF SECRET KNOWLEDGE OF POSSIBLE BIAS, VIOLATED PETITIONERS' RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

A. The Appearance of Bias on the Part of the Trial Judge Created an Inherent Conflict Which Should Have Required His Recusal.

The Court of Appeals' Opinion correctly reflects that ten days prior to scheduled oral argument, petitioners filed their motion for remand with that court for determination of a motion for relief from judgment and for disqualification of the trial judge.

What is not so apparent is that the filing was precipitated by information petitioners had only recently become aware of through the Colorado Supreme Court's decision in Inquiry Concerning William L. Jones, a District Judge, 728 P.2d 311 (Colo. 1986). That decision, in turn, made reference to a private reprimand issued to Judge Jones in December 1983 by the Commission on Judicial Discipline ("Commission"), at a time when the Commission was chaired by Blanche T. Cowperthwaite, mother of the two petitioners most prominent in developing the Project.

As subsequently became known, Judge Jones admitted to recognizing the unusual Cowperthwaite name. This is not surprising, as Mrs. Cowperthwaite had been involved in Eagle County business and community affairs since the Town of Vail was founded twenty six years ago. Even so, other than reviewing the "entire court file," he took no further steps to determine the existence of a conflict (Order Denying Disqualification at 2).

There was no way for the petitioners or Mrs. Cowperthwaite to have challenged the propriety of Judge Jones hearing the original case. Judge Jones was the only person who could verify both the family relationship and Mrs. Cowperthwaite's financial interest in the Project which, by his own admission, would have prompted him to recuse himself. (Order Denying Disqualification at 2, 4).

Due to the secrecy of the Commission's deliberations, affidavits submitted with petitioners' motions by Charles Cowperthwaite and Blanche Cowperthwaite were largely limited to telling of Mrs. Cowperthwaite's 12 year service on the Commission and her tenure as its chairperson. The contents of a confidential affidavit submitted directly to Judge Jones by Mrs. Cowperthwaite are unknown to petitioners.

The information about Mrs. Cowperthwaite's interest in the Project was close at hand. The Cowperthwaite-Vail, Ltd. Limited Partnership Agreement referred to in the court file (Complaint

¶ 2) was of public record in the small Eagle County Courthouse where the chambers and courtroom used by Judge Jones were located. Judge Jones had immediate access to these documents which would have disclosed Mrs. Cowperthwaite's financial interest in the petitioner entity, Cowperthwaite-Vail, Ltd., which owned 90% of the Project. Moreover, an inquiry of petitioners or their counsel would have disclosed her financial interest and that she is the mother of petitioners James and Charles Cowperthwaite. The Trial Judge's failure to make such an inquiry, in light of his admitted awareness of a possible relationship, suggests that he was concerned only with the most technical application of the rules governing disqualification of a judge.

The decisions of the Colorado courts, properly applied and adhered to, should have required the trial judge to recuse himself in this case. The Colorado Supreme Court has held that it is an abuse of discretion for a trial judge not to

recuse himself where it may appear to the parties or to the public that he may be biased or prejudiced. Johnson v. District Court, 674 P.2d 952, 956 (Colo. 1984). Recusal is appropriate even if the judge is convinced of his own impartiality. Id. Since appearances can be as damaging to public confidence in the courts as actual bias or prejudice, the courts scrupulously avoid even the appearance of same. People v. District Court, 192 Colo. 503, 560 P.2d 828 (1977).

More importantly, this Court has recognized that, under appropriate circumstances, recusal of a state court judge on the grounds of bias and prejudice can be constitutionally required. Aetna Life Insurance Co. v. Lavoie, 475 U.S. 815, 821 (1986). The safeguards afforded by the due process clause of the Fourteenth Amendment are triggered whenever the actions of a state court judge in failing to recuse himself "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as

fundamental.'" Aetna Life, 475 U.S. at 821, citing Patterson v. New York, 432 U.S. 197, 201-02 (1977). Surely the "conscience of our people" would be deeply offended by a judicial system which permits a member of the judiciary to decide a dispute in a manner directly adverse to the personal and financial interest of an individual who had previously taken a significant role in reprimanding him. The disputed claims concerning petitioners' property interests were thus adjudicated without the due process protections mandated by the Fourteenth Amendment.

The injustice created by the Trial Judge's inherent conflict unfortunately went uncorrected by the Colorado courts. This result, however, should not stay this Court's hand in effectuating a meaningful remedy for petitioners. Because of the constitutional dimension to petitioners' deprivation, this Court should act to ensure that petitioners finally receive due process.

B. The Confidential Nature of Colorado's Judicial Disciplinary System is Further Reason Why the Trial Judge's Recusal Should Have Been Mandatory.

The confidential nature of Colorado's judicial disciplinary system placed petitioners in a unique and vulnerable position before the Trial Court. The Trial Judge alone knew of his possible bias against the mother of the petitioners James and Charles Cowperthwaite. He chose not to tell anyone of the problem. Instead, he opted to take refuge in the veil of secrecy created by this disciplinary system.

The Commission is composed of ten members, four of whom are non-lawyers like Mrs. Cowperthwaite. It has jurisdiction over the conduct of justices and judges who serve in the Colorado state court system. Under Article VI, Section 23 (3) (g) of the Colorado Constitution, Sections 24-72-401 and 402 of the Colorado Revised Statutes, and

Rule 6 of the Colorado Rules of Judicial Discipline, all proceedings before the Commission are confidential prior to the filing of a recommendation of discipline to the Colorado Supreme Court.

The veil of confidentiality remains even after a judge has been privately reprimanded or censored by the Commission. The Colorado scheme of confidentiality regarding judicial discipline is similar to that procedure used in 17 other states. Wehmhoefer, "The Confidentiality of Judicial Disciplinary Proceedings," The Colorado Lawyer 1043 (1988). Under such procedure, judges in 18 states thus enjoy a special protection not afforded others who may be charged with misconduct relating to the performance of their official duties.

This Court has made clear that judges are not "anointed priests" deserving special protection not afforded other public servants. Bridges v. California, 314 U.S. 252, 291-92 (1941). The "special protection" afforded the Trial Judge by Colorado's confidentiality scheme enabled him to

conceal his involvement in proceedings before the Commission to the detriment of parties whose misfortune it was to have their mother serving as a chairperson of that body at the time the judge was disciplined. Because of the secret nature of the system, petitioners were completely ignorant of the inherent conflict their case presented to the Trial Judge. Clearly, this fact only heightens the inappropriateness of the Trial Judge's actions. Fully cognizant of the parties' lack of knowledge, the situation should have cried out for the Trial Judge's recusal on the court's own motion. In failing to do so, the injury to petitioners' due process rights becomes self evident.

On recommendation of the Commission, Judge Jones was publically reprimanded by the Colorado Supreme Court -- the first time in history that court had taken such an action. Inquiry Concerning William L. Jones, 728 P. 2d 311; Miller, "State's Top Jurist Would Open Probes of Judges to Public," The Denver Post (September 13,

1987) ("Miller"). Judge Jones failed to rule timely on a "relatively uncomplex" civil case involving numerous elderly people in a dispute with the seller of timeshare units in a resort condominium. He took 27 months to make his decision. The court said he had failed to dispose of business promptly and also had "willfully or persistently failed to perform (his) judicial duties . . . ." 728 P. 2d at 314.

The Colorado Supreme Court's reprimand was issued partly because it wasn't the first time Judge Jones had been tardy in making a decision, noting that in December, 1983, the Commission had privately reprimanded Judge Jones for a two year delay in rendering a decision in another case. 728 P. 2d at 312. It is now apparent that Mrs. Cowperthwaite presided over the Commission hearings that culminated in such reprimand. How ironic that Judge Jones's ruling against her sons was made from the bench, instantaneously after hearing oral arguments by counsel.

The Chief Justice of the Colorado Supreme Court has gone on record advocating that formal disciplinary proceedings against judges be made public. Miller, supra. Strangely, the Colorado Supreme Court was unanimous in not wishing to hear arguments in this case where the issue of confidentiality, and its impact on these petitioners, was so pronounced.

It is unfortunate when voluntary public servants, such as members of state judiciary commissions, should suffer injury to themselves and to members of their families while carrying out their duties. How much worse if the very court system, whose integrity they worked to maintain, fails to protect them from the bias of a judge who they may have disciplined.

Tremendous progress has been made in recent years to reduce secrecy in public affairs. Sunshine laws are in effect everywhere; Congress and many state legislatures have passed freedom of information laws requiring government agencies to

disclose information they possess upon request. It is improbable this case would ever have come before this Court if the secrecy provisions of the Commission had not deprived petitioners of a trial before an incontrovertibly impartial tribunal.

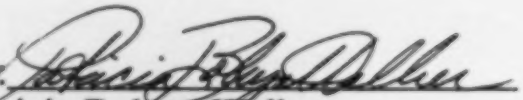
How sad for the country and its people if the last bastion of secrecy in government should turn out to be the American judiciary.

CONCLUSION

The Court of Appeals' misapplication of the Act to virtually all interests in real estate carrying the right to exclusive use, coupled with the denial of due process to petitioners, represent special and important reasons justifying review of the Court of Appeals' decision in this case. Accordingly, this Court should grant the petition and issue its writ of certiorari to the Colorado Court of Appeals.

Respectfully submitted this 23 day of November, 1988.

PENDLETON & SABIAN, P.C.

By: 

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VOLUME II

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APPENDIX

DISTRICT COURT, EAGLE COUNTY, COLORADO

Case No. 83 CV 341

CONCLUSIONS OF LAW, JUDGMENT AND ORDER

MANUEL BENET GIRALT a/k/a MANUEL BENET,

Plaintiff,

v.

(1) VAIL VILLAGE INN ASSOCIATES, a Colorado partnership, d/b/a VILLAGE INN PLAZA;
(2) COWPERTHWAITE-VAIL, LTD., a Colorado limited partnership;
(3) JAMES COWPERTHWAITE;
(4) CHARLES H. COWPERTHWAITE;
(5) ROBERT E. BARRETT; and
(6) G. RICHARD KATZENBACH,

Defendants.

This matter came before the court, the Honorable William L. Jones presiding, on January 9, 1985, for hearing upon plaintiff's Motion for Partial Summary Judgment. Plaintiff was represented by

his counsel of record Wendell B. Porterfield, Jr. and Frederick S. Otto; defendants were represented by their counsel of record Martin A. Rosen of the law firm of Pendleton & Sabian, P.C.

After reviewing the pleadings, the affidavits and exhibits of record and having read the briefs and having heard the arguments of counsel, the court made the following Conclusions of Law:

1. Plaintiff's Seventh Claim for Relief seeks a refund of earnest money deposits totaling $185,000.00 paid by plaintiff to defendant Vail Village Inn Associates based upon the alleged violation of the Interstate Land Sales Full Disclosure Act. This claim for relief may be determined by summary judgment as there is no genuine issue of material fact relating to said claim. The facts are as set forth in the

parties' briefs and while there may be disputes as to certain facts, those facts are not material to the determination of plaintiff's Seventh Claim for Relief and plaintiff's Motion for Partial Summary Judgment.

2. Defendants, developer Vail Village Inn Associates and the partners thereof, claim that the developer is exempt from the requirements of the Interstate Land Sales Full Disclosure Act and the requirements that a statement of record be in effect and that a property report have been furnished to plaintiff, on one of four grounds, as follows:

a. The sale or lease of improved land on which there is a residential, commercial, condominium, or industrial building (15 USC 1702(a)(2)). The sales to plaintiff were to be the sales of condominium units to be built.

The contracts were entered into on or about August 4, and August 10, 1981, respectively; the Declaration of Covenants, Conditions and Restrictions of Village Inn Plaza were not recorded until November 19, 1982. Therefore the contracts were for condominiums to be built and for property to be improved; the contracts were not for condominiums already built. The property on which the condominiums were built was not improved when the contracts were signed although there may have been some improvements thereon. Nevertheless the court determines that the condominium units did not and could not exist as a matter of law until the declaration was recorded. Defendants therefore may not rely upon this exemption.

b. The sale or lease of land under a contract obligating a seller or

lessor to erect such a building thereon within a period of two years; (15 USC 1702(a)(2)). The contracts at issue here provide that the developer "anticipates" that the units will be built within two years; the contracts do not unconditionally "obligate" the developer to build within two years and do not give the plaintiff a right of specific performance against the developer. The court cannot equate the term "anticipates" with the term "obligates" so as to qualify the transactions under this exemption. The defendants may not therefore rely upon this exemption.

c. The sale or lease of lots in a subdivision containing less than 25 lots (15 USC 1702(a)(1)). Defendants argue that when the contracts were entered into the property was described as Lots O and P and thus exempt. The

court rejects this argument and notes that the contracts were not for the sale of interests in Lots O and P but for the sale of condominiums to be built on said lots.

d. The sale or lease of lots in a subdivision containing fewer than 100 lots which are not exempt under section 1 of this Section. (15 USC 1702(b)(2)). This exemption does not apply as the Declaration specifically provides that 141 condominium units are created. Defendants point out that plaintiff has alleged in his other claims for relief that some of the units do not constitute condominiums as defined in C.R.S. 38-33-103(1), and that if such is true the project would contain fewer than 100 units. The court determines that the declaration created 141 units and that if such units are not statutory condominiums

such defect goes to marketability and not to the number of units created or proposed.

The court determines that the defendants are not exempt under any of these provisions.

3. Defendants argue that certain telex documents and certain telegrams which it sent to the plaintiff purchaser constitute a novation or modification of the original contracts and that the dates on which said telegrams and telexes were sent should be used as the measuring date or dates on which the contracts were entered into for the purposes of determining the applicability of exemptions under the act. The court notes that paragraph 17 of the contracts, which contracts were drafted by defendants, provide that "no modification of this agreement shall be claimed by

purchasers subsequent to the execution hereof unless first produced to writing and executed by each of the parties hereto." Defendants have produced no writing executed by each of the parties and therefore defendants may not rely upon this argument to exempt the transaction under 15 USC 1702(a)(2), the sale of improved land exemption.

4. The determination of plaintiff's motion in plaintiff's favor will dispose of this case and render plaintiff's alternative claims for relief moot as such claims are cumulative. The court finds that there is no just reason for delay in the entry of final judgment, subject to the additional order as set forth below, and will direct the entry of final judgment.

5. The court determines that plaintiff's motion for summary judgment

should be granted and that judgment should enter in favor of plaintiff and against defendants, jointly and severally, in the amount of $185,000.00.

6. Plaintiff was ordered to complete his response to discovery that were outstanding at the time of the hearing on January 9, 1985. Plaintiff has done so and defendants have filed his supplemental response and affidavit on January 28, 1985. Plaintiff has filed a motion to alter or amend the judgment pursuant to C.R.C.P. 59(e) to add statutory interest and attorney fees. Defendants have filed a response to that motion.

7. The court denies defendants' request to reverse the order for summary judgment. The request of plaintiff for statutory interest is granted but the request for attorney fees shall be set

for hearing to determine if they were reasonable and necessary. The stay on the entry of the judgment is removed.

DONE and SIGNED IN CHAMBERS, this 14th day of March, 1985.

BY THE COURT:

/s/ Wm. L. Jones
Wm. L. Jones
Judge

CERTIFICATE OF MAILING

I do hereby certify that I have mailed a true and correct copy of the foregoing CONCLUSIONS OF LAW, JUDGMENT AND ORDER, this 15th day of March, 1985, postage prepaid and addressed to the following:

Wendell B. Porterfield, Jr., Esq.
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/s/ Christine L. Herzing
Christine L. Herzing

DISTRICT COURT, COUNTY OF EAGLE, STATE OF COLORADO

Case No. 83CV341

ORDER

MANUEL BENET GIRALT, a/k/a MANUEL BENET,

Plaintiff,

v.

VAIL VILLAGE INN ASSOCIATES, a Colorado partnership, d/b/a VILLAGE INN PLAZA; COWPERTHWAITE-VAIL, LTD., a Colorado limited partnership; JAMES COWPERTHWAITE; CHARLES H. COWPERTHWAITE; ROBERT E. BARRETT; and G. RICHARD KATZENBACH,

Defendants.

This matter comes before the Court on remand from the Court of Appeals to consider Defendants' Motion for Relief From Judgment and Disqualification of Judge with attached affidavit. Plaintiff has filed a response to the Defendants' motion, a copy of which is attached.

On January 9, 1985, this Court heard a motion filed by plaintiff for partial summary judgment. The material facts were uncontested, and the Court had thoroughly read the briefs and supporting documents prior to the oral argument. At the close of the oral argument, the Court granted summary judgment in favor of the plaintiff and entered a Rule 54(b) ruling. Counsel for plaintiff was ordered to prepare an order and submit the same to defendants' counsel for approval as to form, and this was done, and the Court entered this order on February 15, 1985.

Thereafter, the parties filed Motion for Reconsideration and briefs in support of and in opposition to that motion, and the Court entered its final order on March 14, 1985, granting Plaintiff's Motion for Partial Summary Judgment.

Subsequently, the matter was appealed to the Colorado Court of Appeals, and one week before oral argument on the merits of the case, and two years after the Trial Court order, a Motion for Relief From Judgment and for Disqualification of Judge was filed by the defendants in both the District Court and the Court of Appeals.

On March 16, 1987, the Colorado Court of Appeals remanded the case to the trial court with directions to forthwith determine issues raised by Defendants' Motion for Relief From Judgment and Disqualification of Judge. Confirmation of that Court of Appeals order was received by the District Court on March 30, 1987.

The essence of defendants' motion is that because this Court received a private reprimand in December 1983 from

the Commission on Judicial Discipline, and the mother of some of the individual defendants was on the Commission at that time, this Court should have disqualified itself in January of 1985 when it was presented with Plaintiff's Motion for Partial Summary Judgment.

Defendants contend that because the Cowperthwaite name is unusual, and they have been involved in real estate in Vail, Colorado, since 1963, that this Court must have known that their mother owned an interest in the property affected by this lawsuit. Quite the contrary is true. It is interesting to note that the defendants are now making an affidavit as to what was known by the trial court two years ago.

In the fall of 1984, when Plaintiff's Motion for Partial Summary Judgment was filed and it became apparent

that this issue was going to be presented to the Court, this Court did, because of the similarity of names, check the entire court file to determine that Mrs. Cowperthwaite was not a named party in this action. The Court, not finding that Mrs. Cowperthwaite was involved, found no reason to disqualify itself. Additionally, this Court did not know at that time that Blanche Cowperthwaite was the mother of James and Charles Cowperthwaite until this issue was raised in another tribunal 16 months later.

This Court did not know the Cowperthwaites personally and had not discussed the family relationships with anyone. The implication is that because the Cowperthwaites had been involved in real estate in Vail since 1963, and were well known in that town, that this Court knew, even though it was not a matter of

record, that Mrs. Cowperthwaite had an interest in the subject matter of this case. There are thousands of condominiums and other residential units in Vail, Colorado, and who owns what unit or property at any given time is just something that this Court does not attempt to keep informed about. Furthermore, because this Court does not believe in or practice the Senator McCarthy principle of guilt by association, the mere fact that Mrs. Cowperthwaite was related in some manner to the named defendants would not have caused this Court to be prejudiced or biased against these defendants even if it had known the relationship, which it denies that it did.

The affidavit of the defendant is mere suspicion, surmise, speculation, and conjecture, and the mere conclusions of

the defendants. Such allegations are insufficient to provide a basis for disqualification. Litinsky v. Querard, 683 P.2d 816 (Ct. App. 1984).

Additionally, the affidavit submitted with defendants' motion implies that the Court had made a decision before oral argument and read it after oral argument. This is more suspicion and surmise, and that's purely and simply not true. The case was somewhat complex and involved a federal statute known as the Interstate Land Sales Act. The case had been thoroughly briefed by both sides, and the briefs contained numerous documents in support of their respective positions. This Court had read all the briefs and supporting documents prior to oral argument on summary judgment and had tabbed many crucial parts of the briefs

and documents. The Court took notes during the oral arguments.

At the conclusion of the oral arguments, this Court made its ruling and referred to the briefs and other documents, as well as its notes from the oral argument. No other writing was either present or used by the Court. As stated above, this Court was well prepared for the hearing in January of 1985 and ruled against the defendants as a matter of law, based upon the legal principles involved, and not on the basis of identity of any of the parties or any bias or prejudice. As pointed out by plaintiff's counsel, this was a decision on summary judgment, which almost means by definition that there were no factual issues. If the trial court made an error of law, that can be corrected by the appellate court. The legal efficacy of

the ruling is supported by appellate decisions from other jurisdictions since that date.

This Court is well aware of the decisions such as Johnson v. District Court, 674 P.2d 952 (Colo. 1984), but finds them not to be controlling here since the affidavit in support of defendants' motion is based on surmise, speculation, and conjecture and not on the personal knowledge of the affiant. This Court is aware that pursuant to the above-quoted Johnson case, the issue is the appearance of impropriety and that the judge should not pass on the truth or falsity of the allegations of the affidavit in making a determination of this type of motion. However, believing that truth and veracity always have a place in court proceedings, this Court must, nevertheless, deny the allegations

in defendants' affidavit, especially since this Court has personal knowledge of what it did or did not know on January 1985 and defendants do not.

It is therefore ordered that the Defendants' Motion for Relief From Judgment is hereby denied.

This Court, having been subsequently made aware of Mrs. Cowperthwaite's interest in the property involved in this case, hereby disqualifies itself from any further action in this case in the event that it is reversed ~~or remanded~~ by the appellate courts.

Motion for Trial Court Reconsideration of this ruling is dispensed with and this case is returned to the Court of Appeals for decision upon its merits.

Done and signed in chambers this 1st day of April 1987.

BY THE COURT:

/s/ Wm. L. Jones
Wm. L. Jones
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 3d day of April 1987 I did deposit in the United States mail the foregoing Order, postage prepaid, addressed to the following:

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/s/ Heather Hodges

COLORADO COURT OF APPEALS

No. 85CA0602

MANUEL BENET GIRALT, a/k/a MANUEL BENET,

Plaintiff-Appellee,

v.

VAIL VILLAGE INN ASSOCIATES, a Colorado partnership, d/b/a VILLAGE INN PLAZA; COWPERTHWAITE-VAIL, LTD., a Colorado limited partnership; JAMES COWPERTHWAITE; CHARLES H. COWPERTHWAITE; ROBERT E. BARRETT; and G. RICHARD KATZENBACH,

Defendants-Appellants.

Appeal from the District Court of Eagle County

Honorable William L. Jones, Judge

DIVISION III JUDGMENT AFFIRMED
Opinion by JUDGE TURSI
Sternberg and Babcock, JJ., concur

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Defendants, Vail Village Inn Associates, Cowperthwaite-Vail, Ltd., James Cowperthwaite, Charles H. Cowperthwaite, Robert E. Barrett, and G. Richard Katzenbach, appeal the summary judgment entered in favor of plaintiff, Manuel Benet Giralt. They assert (1) that the trial judge should have disqualified himself prior to his entry of summary judgment, (2) that plaintiff failed to establish the jurisdiction of the federal Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701, et seq. (1982) (the "Act"); (3) that the Act did not apply to their condominium project; and (4) that their project was within exemptions to the Act. We affirm.

Defendant Vail Village Inn Associates ("Vail Village") is a general partnership whose general partners are the other named defendants. Vail Village

developed a residential and commercial condominium complex in Eagle County.

In August of 1981, approximately four months after construction had begun on the project, Giralt executed a purchase agreement with Vail Village to purchase a residential unit. A week later he executed a second agreement to purchase an additional residential unit. Giralt made a total earnest money deposit of $185,000. In May of 1982, the parties modified both contracts agreeing that Giralt would pay Vail Village for some additional options.

In January of 1983, Giralt informed Vail Village that he did not have sufficient funds to close on both units, but that he could close on one if he could pool his earnest money deposits and delay the closing. Vail Village agreed to Giralt's purchase of only one unit

subject to several conditions. Those conditions were not met and Vail Village retained Giralt's earnest money deposits as liquidated damages pursuant to the original purchase agreements.

Giralt filed this action to recover his $185,000 earnest money deposits. Pointing to requirements set out in the Act, he asserted, in part, that at the time the purchase agreements were executed (1) a "statement of record" regarding the project was not in effect, and (2) he was not provided a "property report" in advance of his signing the purchase agreements. Consequently, he sought revocation of the contracts pursuant to 15 U.S.C. 1703(c)(1982) and recovery of his earnest money deposits.

Giralt moved for summary judgment on his claim pursuant to the Act. At the hearing, it was conceded that no

"statement of record" had been in effect and that Vail Village had not provided Giralt a "property report." Instead, Vail Village argued the project was within exceptions to the Act; therefore, it was not required to provide either.

The trial court entered summary judgment in favor of the plaintiff determining that there were no genuine issues of material fact and concluding the project was not within any of the exceptions to the Act. The trial court further determined that entry of summary judgment on this claim rendered Giralt's alternative claims for relief moot. It entered final judgment against the defendants for $185,000.

Defendants filed this appeal of the trial court's entry of summary judgment. Ten days prior to the scheduled oral arguments, defendants filed a motion for

remand to the trial court for determination of a motion for relief from judgment and for disqualification of the trial judge with a supporting affidavit from Charles Cowperthwaite. They asserted that they had recently discovered that the trial judge had been the subject of disciplinary proceedings before the Commission of Judicial Discipline at a time when it was probable that Blanche Cowperthwaite served on the Commission. Blanche Cowperthwaite is the mother of two named defendants and a member of the family partnership Cowperthwaite-Vail, Ltd. Therefore, defendants maintained that Blanche Cowperthwaite's involvement in the disciplinary proceedings must have affected the trial judge's partiality in deciding the case and that the judge

should have disqualified himself on his own motion.

This court granted the remand, and Blanche Cowperthwaite submitted a sealed, confidential affidavit and an unsealed affidavit to the trial court. After considering the motion, affidavits and arguments of the parties, the trial judge denied defendants relief from the judgment. However, since he was made aware, subsequent to his entry of summary judgment, that Blanche Cowperthwaite had an interest in the property involved in the action, the trial judge disqualified himself from any future action in the case. He returned the action to this court for a decision on the merits.

I

Before addressing the defendants' challenges to the summary judgment, we consider their assertion that the trial

judge should have disqualified himself before he entered that judgment because his impartiality might reasonably be questioned. We conclude that such disqualification was not required.

"A judge shall be disqualified in an action in which he is interested or prejudiced . . . or is so related or connected with any party or his attorney as to render it improper for him to sit on the trial, appeal, or other proceeding therein." C R.C.P. 97; see Code of Judicial Conduct Canon 3(C).

Even though a trial judge believes in his or her own impartiality, the court's duty is to "eliminate every semblance of reasonable doubt or suspicion that a trial by a fair and impartial tribunal may be denied." Johnson v. District Court, 674 P.2d 952 (Colo. 1984) (emphasis in original).

When presented with a motion for disqualification, the trial judge is required to accept as true the facts stated in the motion and accompanying affidavits and determine only their legal sufficiency. Zoline v. Telluride Lodge Ass'n, 732 P.2d 635 (Colo. 1984); People v. Botham, 629 P.2d 589 (Colo. 1981). To be legally sufficient, the motion and affidavits must state facts from which it may reasonably be inferred that the judge has a bias or prejudice that will prevent him from dealing fairly with the moving party. Zoline v. Telluride Lodge Ass'n, supra.

The question of whether a judge should be disqualified in a civil case is a matter within the discretion of the trial court, and its ruling thereon will not be reversed unless an abuse of discretion is shown. Zoline v. Telluride

Lodge Ass'n, supra; In re Marriage of Mann, 655 P.2d 814 (Colo. 1982).

Here, the defendants contend that Blanche Cowperthwaite's service on the Commission of Judicial Discipline which considered a matter involving the trial judge during her tenure, coupled with her relationship with the defendants, mandates that the trial judge's impartiality in deciding this case might reasonably be questioned.

However, we must consider the facts before the trial judge at the time he entered summary judgment against the defendants. At that time there was no information before the trial judge establishing a relationship between the defendants and Blanche Cowperthwaite. Furthermore, because of the similarity of names, the trial judge had reviewed the entire court file to determine whether

Blanche Cowperthwaite had any connection with the action and found none.

Therefore, our review of the record, including Charles and Blanche Cowperthwaite's affidavits (sealed and unsealed), reveals no reasonable inference of bias or prejudice toward a party up to and including the time when summary judgment was entered. Hence, the trial judge's decision not to grant relief from that judgment was proper and will not be reversed on appeal.

Since there was no appearance of impropriety in this case, we address the questions of law presented for our review. Cf. Williams v. Farmers Insurance Group, Inc., 720 P.2d 598 (Colo. App. 1985) (where trial court determination was tainted by an appearance of impropriety, this court

would not address the questions of law presented for review).

II

For the first time at oral argument, the defendants raised a question of jurisdiction in this case. They argued that in reviewing the complaint, answer, transcript, and order there was absolutely no reference to use of interstate commerce or the mails; therefore, the jurisdictional element of the Act specified in 15 U.S.C. § 1703(a) (1982) was not met.

However, the affidavit of James Cowperthwaite in opposition to plaintiff's motion for partial summary judgment states that Vail Village sent two letters to plaintiff via certified mail - return receipt requested which notified him that the closing date for the two units was January 13, 1983.

Therefore, defendants have admitted they used the mails and their challenge to jurisdiction is without merit.

III

Defendants assert the trial court erred on several grounds in granting plaintiff summary judgment on his claim pursuant to the Act. Summary judgment will be granted only if no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. C.R.C.P. 56(c). Once a movant makes a convincing showing that genuine issues are lacking, the opposing party is required to demonstrate by relevant and specific facts that a real controversy exists. Ginter v. Palmer & Co., 196 Colo. 203, 585 P.2d 583 (1978).

First, they argue that the Act applies only to the sale or lease of lots in a subdivision and that "lot" refers to

land and does not include condominiums; therefore, the Act is inapplicable here. We disagree.

The Secretary of Housing and Urban Development ("HUD") has defined "lot" as "any portion, piece, division, unit, or undivided interest in land located in any state or foreign county if the interest includes the right to the exclusive use of a specific portion of the land." 24 C.F.R. § 1710.1 (1987). The Office of Interstate Land Sales Registration, which administers the Act, treats each condominium unit as a lot. 38 Fed. Reg. 23,866 (1973).

When a court is faced with a problem of statutory construction, deference should be given to the interpretation given the statute by the agency charged with its administration. Environmental Protection Agency v. National Crushed

Stone Ass'n, 449 U.S. 64, 101 S.Ct. 295, 66 L.Ed.2d 268 (1980); Lucero v. Climax Molybdenum Co., 732 P.2d 642 (Colo. 1987). Furthermore, the other jurisdictions which have addressed this issue uniformly hold that condominiums are included in the definition of "lots." Winter v. Hollingsworth Properties, Inc., 777 F.2d 1444 (11th Cir. 1985); Schatz v. Jockey Club Phase III, Ltd., 604 F. Supp. 537 (S.D. Fla. 1985); and Nargiz v. Henlopen Developers, 380 A.2d 1361 (Del. 1977).

We conclude condominiums are "lots" within the application of the Act.

IV

Defendants also maintain they fall within the exemptions to the Act set out in 15 U.S.C. § 1702(a)(2). That section states that the provisions of the Act:

> "shall not apply to the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years . . . ."

First, defendants maintain that in January of 1983 plaintiff and Vail Village entered a substitute agreement that plaintiff would pool his deposits and purchase only one condominium. They further argue that in January of 1983 the condominium declaration had been filed and the certificate of occupancy issued; therefore, the condominium existed at that time and its attempted sale was exempt under the first part of the exemption.

However, we conclude that no substitute agreement was entered into by the parties; therefore, defendants may not rely on the January 1983 date to argue they are within the exception.

Where the evidence of agreement consists of documents, the determination of their effect is a matter of law for the court. Pepcol Manufacturing Co. v. Denver Union Corp., 687 P.2d 1310 (Colo. 1984); Radiology Professional Corp v. Trinidad Area Health Ass'n, 195 Colo. 253, 577 P.2d 748 (1978). Extraneous evidence is admissible to prove intent only if there is an ambiguity in the terms of the contract. Radiology Professional Corp v. Trinidad Area Health Ass'n, supra. Whether ambiguity exists in a contract is also a question of law for the court. Pepcol Manufacturing Co. v. Denver Union Corp., supra.

The defendants assert four documents established the substitute agreement. All four were either letters or telexes from defendant Charles Cowperthwaite to plaintiff and each stated essentially the same terms.

> "At the request of your attorney, Fred Otto, this will confirm our agreement, subject to the conditions set forth below, to permit you to take title to Condominium Unit 105 . . . with the deposits on both Unit 105 and 107 . . . to be applied toward this purchase. . . . Our agreement to the foregoing is subject to the following conditions:
>
> 1. The sum of $290,000 must be deposited in Mr. Otto's trust account by January 26, 1983.
>
> 2. The closing of this transaction must occur not later than January 31, 1983.
>
> 3. Completion of the wire-transfer will

> operate to terminate all rights you have in the Purchase Agreement dated August 4, 1981 relating to the purchase of Unit [107].
>
> Should the above conditions not be met within the time periods specified above, Vail Village Inn Associates will consider you in default as to both Purchase Agreements and elect to retain all deposits made thereunder as liquidated damages, all in accordance with said Purchase Agreement."

We conclude the terms of the agreement are unambiguous. The proposed substitute agreement was contingent upon the performance of specific conditions by plaintiff. Further, Vail Village retained the right to hold plaintiff in default pursuant to the original agreements should plaintiff fail to meet the conditions. It is undisputed that plaintiff failed to fulfill those

conditions. Therefore, the parties did not enter a substitute agreement.

Next, defendants argue that the project was within the first part of the exception because the project was a "building" either at the time the original purchase agreements were entered or, if not then, when the contracts were modified to include additional options. They maintain that the term "building" may apply either to a finished or an unfinished product of construction.

However, for the purposes of this exemption regarding condominium dwellings the Secretary of Housing and Urban Development has defined building as "the dwelling unit and all utilities or systems necessary to support normal occupancy." 38 Fed. Reg. 23,866 (1973).

The defendants concede the project was only 21 percent complete at the time

the sale contracts were executed and only 83 percent complete when the contracts were modified. Consequently, it is undisputed that the condominium units did not exist, nor could they support normal occupancy at either time the defendants argue that the sale occurred. Therefore, their project was not a "building" at the time of the sale and was not within the first part of the exception.

The defendants also maintain the project was within the second part of this exception since the original purchase agreements obligated Vail Village to complete the improvements within two years of the execution of the agreements. Again we disagree.

The agreements provide:

> "Seller anticipates that the construction of the Unit to be conveyed hereunder shall be completed on or before

December 1, 1982 (sometimes referred to herein as the 'completion date'). Seller's obligation to provide said Unit, however, and thereafter to close on this Agreement by the Closing Date provided herein is expressly subject to and said dates for completion and closing shall be deemed extended by, any period or delay resulting from the inability to obtain materials, adverse weather, strikes, acts of war, shortages of labor, acts of God, aggression, destruction, subcontractor's breaches of contract, change orders contracted for by Purchaser, governmental regulations, court decrees or orders or any other condition or occurrence beyond the control of Seller."

. . . .

"Should Seller be unable or refuses to complete and close the sale of the Unit hereunder to Purchaser, as herein set forth by reason of failure of title or otherwise . . . upon repayment to Purchaser of all funds deposited hereunder, Seller and Purchaser shall be

> relieved of all further obligations hereunder . . . ."

Interpretation of a written contract and determination of whether it is ambiguous are questions of law for the court. Pepcol Manufacturing Co. v. Denver Union Corp., supra.

We conclude this contract is not ambiguous. The contract does not obligate Vail Village to complete the project within two years. Instead, it merely provides an anticipated completion date. Furthermore, the contract provides the seller the right to refuse to complete the condominium for any reason whatsoever. Therefore, the project is not within the second part of the exemption.

V

Finally, defendants contend that there is a legal issue as to how many

condominiums exist in the project. They maintain the 107 parking units contained in the project are not condominiums pursuant to the Condominium Ownership Act, § 38-33-101, et seq., C.R.S. (1982 Repl. Vol. 16A); therefore, the project is within the terms of 15 U.S.C. § 1702(b)(1) exempting from the Act the sale of lots in a subdivision containing fewer than one hundred lots.

However, it is irrelevant whether the parking units are condominiums pursuant to Colorado law. What we must determine is whether they are lots within the meaning of the Act.

As stated above, "lot" is defined as "any portion, piece, division, unit, or undivided interest in land located in any state or foreign county <u>if the interest includes the right to the exclusive use of a specific portion of the land</u>." 24

C.F.R. § 1710.1 (1987) (emphasis supplied). The Secretary of Housing and Urban Development has stated that the reason condominiums are treated as lots pursuant to the Act even though they are not land, per se, is because they carry the indicia of real estate and that the right to condominium space is a form of ownership not a structural description. 38 Fed. Reg. 23,866 (1973).

Here, the project's Declaration of Covenants, Conditions and Restrictions states that the project is divided into 141 condominiums (including the 107 parking condominiums), each consisting of a separate fee simple estate in a particular condominium and that each owner shall be entitled to the exclusive ownership and possession of his condominium.

Since the parking units are interests in real estate and a form of ownership of space to which the owners have the right to exclusive use, we conclude they are lots within the meaning of the Act.

Plaintiff's request for attorney fees incurred on this appeal is denied.

Judgment affirmed.

JUDGE STERNBERG and JUDGE BABCOCK concur.

SUPREME COURT, STATE OF COLORADO

Case No. 88SC252
Certiorari to the Colorado Court of Appeals 85CA0602
Eagle County District Court 83CV341

ORDER OF COURT

VAIL VILLAGE INN ASSOCIATES, a Colorado partnership d/b/a Village Inn Plaza; COWPERTHWAITE-VAIL, LTD., a Colorado limited partnership; JAMES COWPERTHWAITE; CHARLES H. COWPERTHWAITE; ROBERT E. BARRETT and G. RICHARD KATZENBACH,

Petitioners,

v.

MANUEL BENET GIRALT a/k/a MANUEL BENET,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs and the opinion of said Court of Appeals,

IT IS FURTHER ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 29, 1988.

JUSTICE MULLARKEY does not participate.

cc: Gary Sonke, Clerk
Colorado Court of Appeals

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Honorable William L. Jones
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THE CODE OF THE LAWS
OF THE
UNITED STATES OF AMERICA

TITLE 15 -- COMMERCE AND TRADE

CHAPTER 42. INTERSTATE LAND SALES

§ 1701. Definitions

For the purposes of this title [15 USCS §§ 1701 et seq.], the term--

(1) "Secretary" means the Secretary of Housing and Urban Development;

(2) "person" means an individual, or an unincorporated organization, partnership, association, corporation, trust or estate;

(3) "subdivision" means any land which is located in any State or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan;

(4) "common promotional plan" means a plan, undertaken by a single developer or a group of developers acting in concert, to offer lots for sale or lease; where such land is offered for sale by such a developer or group of developers acting in concert, and such land is contiguous or is known, designated, or advertised as a common unit or by a common name, such land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of a common promotional plan;

(5) "developer" means any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision;

(6) "agent" means any person who represents, or acts for or on behalf of,

a developer in selling or leasing, or offering to sell or lease, any lot or lots in a subdivision; but shall not include an attorney at law whose representation of another person consists solely of rendering legal services;

(7) "blanket encumbrance" means a trust deed, mortgage, judgment, or any other lien or encumbrance, including an option or contract to sell or a trust agreement, affecting a subdivision or affecting more than one lot offered within a subdivision, except that such term shall not include any lien or other encumbrance arising as the result of the imposition of any tax assessment by any public authority;

(8) "interstate commerce" means trade or commerce among the several States or between any foreign country and any State;

(9) "State" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(10) "purchaser" means an actual or prospective purchaser or lessee of any lot in a subdivision;

(11) "offer" includes any inducement, solicitation, or attempt to encourage a person to acquire a lot in a subdivision.

(Aug. 1, 1968, P. L. 90-448, Title XIV, § 1402, 82 Stat. 590; Aug. 22, 1974, P. L. 93-383, Title VIII, § 812(a), 88 Stat. 736; Dec. 21., 1979, P. L. 96-153, Title IV, § 401, 93 Stat. 1122.)

§ 1702. Exemptions

(a) Sale or lease of lots generally. Unless the method of disposition is

adopted for the purpose of evasion of this title [15 USCS §§ 1701 et seq.], the provisions of this title [15 USCS §§ 1701 et seq.] shall not apply to--

(1) the sale or lease of lots in a subdivision containing less than twenty-five lots;

(2) the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years;

(3) the sale of evidences of indebtedness secured by a mortgage or deed of trust on real estate;

(4) the sale of securities issued by a real estate investment trust;

(5) the sale or lease of real

estate by any government or government agency;

(6) the sale or lease of cemetery lots;

(7) the sale or lease of lots to any person who acquires such lots for the purpose of engaging in the business of constructing residential, commercial, or industrial buildings or for the purpose of resale or lease of such lots to persons engaged in such business; or

(8) the sale or lease of real estate which is zoned by the appropriate governmental authority for industrial or commercial development or which is restricted to such use by a declaration of covenants, conditions, and restrictions which has been recorded in the official records of the city or county in which such real estate is located, when--

(A) local authorities have approved access from such real estate to a public street or highway;

(B) the purchaser or lessee of such real estate is a duly organized corporation, partnership, trust, or business entity engaged in commercial or industrial business;

(C) the purchaser or lessee of such real estate is represented in the transaction of sale or lease by a representative of its own selection;

(D) the purchaser or lessee of such real estate affirms in writing to the seller or lessor that it either (i) is purchasing or leasing such real estate substantially for its own use, or (ii) has a binding commitment to sell, lease, or sublease such real estate to an entity which meets the requirements of

subparagraph (B), is engaged in commercial or industrial business, and is not affiliated with the seller, lessor, or agent thereof; and

(E) a policy of title insurance or a title opinion is issued in connection with the transaction showing that title to the real estate purchased or leased is vested in the seller or lessor, subject only to such exceptions as may be approved in writing by such purchaser or the lessee prior to recordation of the instrument of conveyance or execution of the lease, but (i) nothing herein shall be construed as requiring the recordation of a lease, and (ii) any purchaser or lessee may waive, in writing in a separate document, the requirement of this subparagraph that a policy of title insurance or title

opinion be issued in connection with the transaction.

(b) Sale or lease of lots subject to other statutory registration and disclosure requirements. Unless the method of disposition is adopted for the purpose of evasion of this title [15 USCS §§ 1701 et seq.], the provisions requiring registration and disclosure (as specified in section 1404(a)(1) and sections 1405 through 1408) [15 USCS §§ 1703(a)(1) and 1704-1707] shall not apply to--

(1) the sale or lease of lots in a subdivision containing fewer than one hundred lots which are not exempt under subsection (a);

(2) the sale or lease of lots in a subdivision if, within the twelve-month period commencing on the date of the first sale or lease of a lot in such

subdivision after the effective date of this subsection or on such other date within that twelve-month period as the Secretary may prescribe, not more than twelve lots are sold or leased, and the sale or lease of the first twelve lots in such subdivision in any subsequent twelve-month period, if not more than twelve lots have been sold or leased in any preceding twelve-month period after the effective date of this subsection;

(3) the sale or lease of lots in a subdivision if each noncontiguous part of such subdivision contains not more than twenty lots, and if the purchaser or lessee (or spouse thereof) has made a personal, on-the-lot inspection of the lot purchased or leased, prior to signing of the contract or agreement to purchase or lease;

(4) the sale or lease of lots in a subdivision in which each of the lots is at least twenty acres (inclusive of easements for ingress and egress or public utilities);

(5) the sale or lease of a lot which is located within a municipality or county where a unit of local government specifies minimum standards for the development of subdivision lots taking place within its boundaries, when--

(A) (i) the subdivision meets all local codes and standards, and (ii) each lot is either zoned for single family residences or, in the absence of a zoning ordinance, is limited exclusively to single family residences;

(B) (i) the lot is situated on a paved street or highway which has been built to standards applicable to streets and highways maintained by the unit of

local government in which the subdivision is located and is acceptable to such unit, or, where such street or highway is not complete, a bond or other surety acceptable to the municipality or county in the full amount of the cost of completing such street or highway has been posted to assure completion to such standards, and (ii) the unit of local government or a homeowners association has accepted or is obligated to accept the responsibility of maintaining such street or highway, except that, in any case in which a homeowners association has accepted or is obligated to accept such responsibility, a good faith written estimate of the cost of carrying out such responsibility over the first ten years of ownership or lease is provided to the purchaser or lessee prior to the signing

of the contract or agreement to purchase or lease;

(C) at the time of closing, potable water, sanitary sewage disposal, and electricity have been extended to the lot or the unit of local government is obligated to install such facilities within one hundred and eighty days, and, for subdivisions which do not have a central water or sewage disposal system, rather than installation of water or sewer facilities, there must be assurances that an adequate potable water supply is available year-round and that the lot is approved for the installation of a septic tank;

(D) the contract of sale requires delivery of a warranty deed (or, where such deed is not commonly used in the jurisdiction where the lot is located, a deed or grant which warrants

that the grantor has not conveyed the lot to another person and that the lot is free from encumbrances made by the grantor or any other person claiming by, through, or under him) to the purchaser within one hundred and eighty days after the signing of the sales contract;

(E) at the time of closing, a title insurance binder or a title opinion reflecting the condition of the title shall be in existence and issued or presented to the purchaser or lessee showing that, subject only to such exceptions as may be approved in writing by the purchaser or lessee at the time of closing, marketable title to the lot is vested in the seller or lessor;

(F) the purchaser or lessee (or spouse thereof) has made a personal, on-the-lot inspection of the lot purchased or leased, prior to signing of

the contract or agreement to purchase or lease; and

(G) there are no offers, by direct mail or telephone solicitation, of gifts, trips, dinners, or other such promotional techniques to induce prospective purchasers or lessees to visit the subdivision or to purchase or lease a lot;

(6) the sale or lease of a lot, if a mobile home is to be erected or placed thereon as a residence, where the lot is sold as a homesite by one party and the home by another, under contracts that obligate such sellers to perform, contingent upon the other seller carrying out its obligations so that a completed mobile home will be erected or placed on the completed homesite within a period of two years, and provide for all funds received by the sellers to be deposited

in escrow accounts (controlled by parties independent of the sellers) until the transactions are completed, and further provide that such funds shall be released to the buyer on demand without prejudice if the land with the mobile home erected or placed thereon is not conveyed within such two-year period. Such homesite must conform to all local codes and standards for mobile home subdivisions, if any, must provide potable water, sanitary sewage disposal, electricity, access by roads, the purchaser must receive marketable title to the lot, and where common facilities are to be provided, they must be completed or fully funded;

(7) (A) the sale or lease of real estate by a developer who is engaged in a sales operation which is intrastate in nature. For purposes of this exemption, a lot may be sold only if--

(i) the lot is free and clear of all liens, encumbrances, and adverse claims;

(ii) the purchaser or lessee (or spouse thereof) has made a personal on-the-lot inspection of the lot to be purchased or leased;

(iii) each purchase or lease agreement contains--

(I) a clear and specific statement describing a good faith estimate of the year of completion of, and the party responsible for, providing and maintaining the roads, water facilities, sewer facilities and any existing or promised amenities; and

(II) a nonwaivable provision specifying that the contract or agreement may be revoked at the option of the purchaser or lessee until midnight of the seventh day following the signing of

such contract or agreement or until such later time as may be required pursuant to applicable State laws; and

(iv) the purchaser or lessee has, prior to the time the contract or lease is entered into, acknowledged in writing the receipt of a written statement by the developer containing good faith estimates of the cost of providing electric, water, sewer, gas, and telephone service to such lot.

(B) As used in the subparagraph (A)(i) of this paragraph, the terms "liens," "encumbrances," and "adverse claims" do not include United States land patents and similar Federal grants or reservations, property reservations which land developers commonly convey or dedicate to local bodies or public utilities for the purpose of bringing public services to

the land being developed, taxes and assessments imposed by a State, by any other public body having authority to assess and tax property, or by a property owners' association, which, under applicable State or local law, constitute liens on the property before they are due and payable or beneficial property restrictions which would be enforceable by other lot owners or lessees in the subdivision, if--

(i) the developer, prior to the time the contract of sale or lease is entered into, has furnished each purchaser or lessee with a statement setting forth in descriptive and concise terms all such liens, reservations, taxes, assessments and restrictions which are applicable to the lot to be purchased or leased; and

(ii) receipt of such statement has been acknowledged in writing by the purchaser or lessee.

(C) For the purpose of this paragraph, a sales operation is "intrastate in nature" if the developer is subject to the laws of the State in which the land is located, and each lot in the subdivision, other than those which are exempt under section 1403(a), (b)(6), or (b)(8) [subsecs. (a), (b)(6), or (b)(8) of this section], is sold or leased to residents of the State in which the land is located; or

(8) the sale or lease of a lot in a subdivision containing fewer than three hundred lots if--

(A) the principal residence of the purchaser or lessee is within the same standard metropolitan statistical area, as defined by the Office of

Management and Budget, as the lot purchased or leased;

(B) the lot is free and clear of liens (such as mortgages, deeds of trust, tax liens, mechanics liens, or judgments) at the time of the signing of the contract or agreement and until a deed is delivered to the purchaser or the lease expires. As used in this subparagraph, the term "liens" does not include (i) United States land patents and similar Federal grants or reservations, (ii) property reservations which land developers commonly convey or dedicate to local bodies or public utilities for the purpose of bringing public services to the land being developed, (iii) taxes and assessments imposed by a State, by any other public body having authority to assess and tax property, or by a property owners'

association, which, under applicable State or local law, constitute liens on the property before they are due and payable or beneficial property restrictions which would be enforceable by other lot owners or lessees in the subdivision, or (iv) other interests described in regulations prescribed by the Secretary;

(C) the purchaser or lessee (or spouse thereof) has made a personal on-the-lot inspection of the lot to be purchased or leased;

(D) each purchase or lease agreement contains (i) a clear and specific statement describing a good faith estimate of the year of completion of and the party responsible for providing and maintaining the roads, water facilities, sewer facilities and any existing or promised amenities; and

(ii) a nonwaivable provision specifying that the contract or agreement may be revoked at the option of the purchaser or lessee until midnight of the seventh day following the signing of such contract or agreement or until such later time as may be required pursuant to applicable State laws;

(E) the purchaser or lessee has, prior to the time the contract or lease is entered into, acknowledged in writing receipt of a written statement by the developer setting forth (i) in descriptive and concise terms all liens, reservations, taxes, assessments, beneficial property restrictions which would be enforceable by other lot owners or lessees in the subdivision, and adverse claims which are applicable to the lot to be purchased or leased, and (ii) good faith estimates of the cost of

providing electric, water, sewer, gas, and telephone service to such lot;

(F) the developer executes and supplies to the purchaser a written instrument designating a person within the State of residence of the purchaser as his agent for service of process and acknowledging that the developer submits to the legal jurisdiction of the State in which the purchaser or lessee resides; and

(G) the developer executes a written affirmation to the effect that he has complied with the provisions of this paragraph, such affirmation to be given on a form provided by the Secretary, which shall include the following: the name and address of the developer; the name and address of the purchaser or lessee; a legal description of the lot; an affirmation that the provisions of

this paragraph have been complied with; a statement that the developer submits to the jurisdiction of this title [15 USCS §§ 1701 et seq.] with regard to the sale or lease; and the signature of the developer.

(c) Rules and regulations. The Secretary may from time to time, pursuant to rules and regulations issued by him, exempt from any of the provisions of this title [15 USCS §§ 1701 et seq.] any subdivision or any lots in a subdivision, if he finds that the enforcement of this title [15 USCS §§ 1701 et seq.] with respect to such subdivision or lots is not necessary in the public interest and for the protection of purchasers by reason of the small amount involved or the limited character of the public offering.

(Aug. 1, 1968, P. L. 90-448, Title XIV, § 1403, 82 Stat. 590; Dec. 24, 1969, P. L. 91-152, Title IV, § 411, 83 Stat. 398; Aug. 22, 1974, P. L. 93-383, Title VIII, § 812(b), 88 Stat. 736; Oct. 31, 1978, P. L. 95-557, Title IX, § 907, 92 Stat. 2127, Dec. 21, 1979, P. L. 96-153, Title IV, § 402, 93 Stat. 1123.)

§ 1703. Requirements respecting sale or lease of lots

(a) Prohibited activities. It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails--

(1) with respect to the sale or lease of any lot not exempt under section 1403 [15 USCS § 1702]--

(A) to sell or lease any lot unless a statement of record with respect to such lot is in effect in accordance with section 1407 [15 USCS § 1706];

(B) to sell or lease any lot unless a printed property report, meeting the requirements of section 1408 [15 USCS § 1707], has been furnished to the purchaser or lessee in advance of the signing of any contract or agreement by such purchaser or lessee;

(C) to sell or lease any lot where any part of the statement of record or the property report contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein pursuant to sections 1405 through 1408 of this title [15 USCS §§ 1704 through 1707] or any regulations thereunder; or

(D) to display or deliver to prospective purchasers or lessees advertising and promotional material which is inconsistent with information required to be disclosed in the property report; or

(2) with respect to the sale or lease, or offer to sell or lease, any lot not exempt under section 1403(a) [15 USCS § 1702(a)]--

(A) to employ any device, scheme, or artifice to defraud;

(B) to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading,

with respect to any information pertinent to the lot or subdivision;

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser; or

(D) to represent that roads, sewers, water, gas, or electric service, or recreational amenities will be provided or completed by the developer without stipulating in the contract of sale or lease that such services or amenities will be provided or completed.

(b) Revocation of nonexempt contract or agreement at option of purchaser or lessee; time limit. Any contract or agreement for the sale or lease of a lot not exempt under section 1403 [15 USCS § 1702] may be revoked at the option of the purchaser or lessee until midnight of the seventh day following the signing of such

contract or agreement or until such later time as may be required pursuant to applicable State laws, and such contract or agreement shall clearly provide this right.

(c) Revocation of contract or agreement at option of purchaser or lessee where required property report not supplied. In the case of any contract or agreement for the sale or lease of a lot for which a property report is required by this title [15 USCS §§ 1701 et seq.] and the property report has not been given to the purchaser or lessee in advance of his or her signing such contract or agreement, such contract or agreement may be revoked at the option of the purchaser or lessee within two years from the date of such signing, and such contract or agreement shall clearly provide this right.

(d) Additional authority for revocation of nonexempt contract or agreement at option of purchaser or lessee; time limit; applicability. Any contract or agreement which is for the sale or lease of a lot not exempt under section 1403 [15 USCS § 1702] and which does not provide--

(1) a description of the lot which makes such lot clearly identifiable and which is in a form acceptable for recording by the appropriate public official responsible for maintaining land records in the jurisdiction in which the lot is located;

(2) that, in the event of a default or breach of the contract or agreement by the purchaser or lessee, the seller or lessor (or successor thereof) will provide the purchaser or lessee with written notice of such default or breach

and of the opportunity, which shall be given such purchaser or lessee, to remedy such default or breach within twenty days after the date of the receipt of such notice; and

(3) that, if the purchaser or lessee loses rights and interest in a lot as a result of a default or breach of the contract or agreement which occurs after the purchaser or lessee has paid 15 per centum of the purchase price of the lot, excluding any interest owed under the contract or agreement, the seller or lessor (or successor thereof) shall refund to such purchaser or lessee any amount which remains after subtracting (A) 15 per centum of the purchase price of the lot, excluding any interest owed under the contract or agreement, or the amount of damages incurred by the seller or lessor (or successor thereof) as a

result of such breach, whichever is greater, from (B) the amount paid by the purchaser or lessee with respect to the purchase price of the lot, excluding any interest paid under the contract or agreement, may be revoked at the option of the purchaser or lessee for two years from the date of the signing of such contract or agreement. This subsection shall not apply to the sale of a lot for which, within one hundred and eighty days after the signing of the sales contract, the purchaser receives a warranty deed (or, where such deed is not commonly used in the jurisdiction where the lot is located, a deed or grant that warrants at least that the grantor has not conveyed the lot to another person and that the lot is free from encumbrances made by the grantor or any other person claiming by, through, or under him or her).

(e) Repayment of purchaser or lessee upon revocation of all money paid under contract or agreement to seller or lessor. If a contract or agreement is revoked pursuant to subsection (b), (c), or (d), if the purchaser or lessee tenders to the seller or lessor (or successor thereof) an instrument conveying his or her rights and interests in the lot, and if the rights and interests and the lot are in a condition which is substantially similar to the condition in which they were conveyed or purported to be conveyed to the purchaser or lessee, such purchaser or lessee shall be entitled to all money paid by him or her under such contract or agreement. (Aug. 1, 1986, P. L. 90-448, Title XIV, § 1404, 82 Stat. 591; Aug. 22, 1974, P. L. 93-383, Title VIII, § 812(c)(1), 88 Stat. 737; Dec. 21, 1979, P. L. 96-153, Title IV, § 403, 93 Stat. 1127.)

38-33-103. Definitions. As used in this article, unless the context otherwise requires:

(1) "Condominium unit" means an individual air space unit together with the interest in the common elements appurtenant to such unit.

(2) "Declaration" is an instrument recorded pursuant to section 38-33-105 and which defines the character, duration, rights, obligations, and limitations of condominium ownership.

(3) Unless otherwise provided in the declaration or by written consent of all the condominium owners, "general common elements" means: The land or the interest therein on which a building or buildings are located; the foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes,

entrances, and exits of such building or buildings; the basements, yards, gardens, parking areas, and storage spaces; the premises for the lodging of custodians or persons in charge of the property; installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, central air conditioning, and incinerating; the elevators, tanks, pumps, motors, fans, compressors, ducts, and in general all apparatus and installations existing for common use; such community and commercial facilities as may be provided for in the declaration; and all other parts of the property necessary or convenient to its existence, maintenance, and safety, or normally in common use.

(4) "Individual air space unit" consists of any enclosed room or rooms occupying all or part of a floor or

floors in a building of one or more floors to be used for residential, professional, commercial, or industrial purposes which has access to a public street.

(5) "Limited common elements" means those common elements designated in the declaration as reserved for use by fewer than all the owners of the individual air space units.

Source: L. 63, p. 782, § 1; C.R.S. 1963, § 118-15-3; L. 69, p. 982, § 2.

ARTICLE VI

Section 23. Retirement and removal of justices and judges. (3) (g) Prior to the filing of a recommendation to the Supreme Court by the commission against any justice or judge, all papers filed with and proceedings before the commission on judicial discipline or masters appointed by the supreme court, pursuant to this subsection (3), shall be confidential, and the filing of papers with and the giving of testimony before the commission or the masters shall be privileged; but no other publication of such papers or proceedings shall be privileged in any action for defamation; except that the record filed by the commission in the Supreme Court continues privileged and a writing which was privileged prior to its filing with the

commission or the masters does not lose such privilege by such filing.

JUDICIAL DISCIPLINARY HEARINGS

24-72-401. **Commission on Judicial Discipline - Confidentiality of Records and Procedures.** The record of an investigation conducted by the commission on judicial discipline or by masters appointed by the Supreme Court at the request of the commission shall contain all papers filed with and all proceedings before the commission or the masters. The record shall be confidential and shall remain confidential after filing with the Supreme Court. A recommendation of the commission for the removal or retirement of a justice or judge shall not be confidential after it is filed with the Supreme Court.

Source: Added, L. 83, p. 1003 § 1.

24-72-402. **Violation - Penalty.** Any member of the commission, any master

appointed by the Supreme Court, or anyone providing assistance to such commission or such masters who willfully and knowingly discloses the contents of any paper filed with, or any proceeding before, such commission or such masters, or willfully and knowingly discloses the contents of any recommendation of the commission before such recommendation is filed with the Supreme Court is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars. This section shall not apply to any necessary communication between the members of the commission or the masters appointed by the supreme court or anyone employed to aid such commission or such masters in the filing or documentation of any paper filed with, or any proceedings before, such commission or such masters or the

preparation of the recommendation of such commission.

Source: Added, L. 83, p. 1003, § 1.

Rule 6. Confidentiality and Privilege

a. **Confidentiality.** All papers and pleadings filed with and proceedings before the commission, or before masters appointed pursuant to these rules, shall be confidential until the commission files a recommendation with the Supreme Court for the removal retirement, suspension, censure, reprimand or discipline of a judge, at which time the recommendation together with the supporting record of the proceedings shall no longer be confidential. The commission may include as part of the record the pleadings in the case, transcripts of formal proceedings, affidavits and exhibits, findings of fact and conclusions of law, legal briefs, or any other documents pertinent to the Supreme Court's consideration of the commission's recommendation.

b. **Privilege.** Any papers or pleadings filed with the commission or testimony given in commission proceedings are considered privileged communications and, therefore, cannot be the subject of any legal action against a participant in a commission proceeding involving any claim, including a claim for defamation. All papers and pleadings filed with Supreme Court in support of a commission recommendation shall continue to be privileged.

c. **Disclosure.** The commission may release confidential information concerning a judge when:

(1) An inquiry is initiated as a result of conduct that is or becomes the subject of widespread public concern, to such an extent that the release of information concerning insufficient cause to proceed or a finding of no misconduct

would benefit the judge and the public, and the judge signs a waiver for this purpose;

(2) A government agency or nominating commission requests information concerning the appointment of a judge or former judge to another judicial position, and the judge signs a waiver for this purpose;

(3) An agency authorized to investigate the qualification of persons for admission to practice law requests information in order to evaluate a judge's application for admission to the bar of another state, and the judge signs a waiver for this purpose.

(4) The chief justice of the Supreme Court requests information pertaining to the appointment or assignment of a retired judge to judicial duties; or

(5) The commission notifies the Supreme Court Grievance Committee of a complaint against a judge involving conduct that may violate the Code of Professional Responsibility.

d. **Use of Closed File.** A closed file involving a previous finding of misconduct may be used by the commission in subsequent proceedings involving allegations of misconduct against the same judge.

e. **Consultation With An Attorney.** It shall not be a breach of this rule for a participant to consult with an attorney.

FILED
DEC 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-876

In The

Supreme Court of the United States

October Term, 1988

VAIL VILLAGE INN ASSOCIATES, a Colorado partnership, dba VILLAGE INN PLAZA; COWPERTHWAITE-VAIL, LTD., a Colorado limited partnership; JAMES COWPERTHWAITE; CHARLES H. COWPERTHWAITE; ROBERT E. BARRETT and G. RICHARD KATZENBACH,

Petitioners,

v.

MANUEL BENET GIRALT, aka MANUEL BENET,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

BRIEF IN OPPOSITION OF RESPONDENT MANUEL BENET GIRALT AKA MANUEL BENET

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QUESTIONS PRESENTED

1. Did the Colorado Court of Appeals err when it applied The Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701, *et seq.* (the "Act") in conformity with every other case interpreting the Act on the definition of "Lot", and in determining that petitioners' project did not fall within any of the exemptions provided in the Act?

2. Did the refusal of the trial judge to vacate an order of summary judgment entered against the petitioners premised upon their post-judgment naked allegation of a "possible" bias or prejudice violate any constitutional rights of the petitioners especially in light of the fact that the trial judge's ruling has twice been subject to appellate review?

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STATEMENT OF THE CASE

As his statement of the case, respondent incorporates the statement of the facts in the opinion below set forth at pages A-22 through A-48 in the Appendix filed by petitioners.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioners Have Failed To Articulate Any Reason To Justify Invocation Of This Court's Discretionary Jurisdiction To Review A Ruling Consistent With All Other Case Law.

The Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701, *et seq.* (the "Act") makes it unlawful for a real estate developer or agent " . . . directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails – (1) with respect to the sale or lease of any lot not exempt . . . unless a statement of record with respect to such lot is in effect . . . " and unless a property report with required disclosures has been furnished to the purchaser in advance of signing any contract. 15 U.S.C. § 1703(a).[1] The Act became law in 1968, and is loosely modeled on securities disclosure laws. Violation by the developer provides the purchaser with, among other remedies, a right to revoke any contract, 15 U.S.C. § 1703(c), and a right to receive back all money paid

[1] The version of the Act set forth in the Appendix filed by petitioners at pages A-51 through A-84 includes amendments made subsequent to the events giving rise to this action. Such amendments do not affect the substantive rights of the parties.

to the developer under the contract. 15 U.S.C. § 1703(e). Respondent timely exercised his recission right and became entitled to a return of his earnest money deposits totalling $185,000.00.

"Lot", while not statutorily defined, has been administratively defined since 1969 to include "any portion, piece, division, unit or undivided interest in land located in any state or foreign country if the interest includes the right to the exclusive use of a specific portion of the land." 24 C.F.R. § 1710.1.[2] The trial court and the Colorado Court of Appeals ruled that a condominium unit was a lot for purposes of application of the Act, a ruling consistent with every other state and federal court addressing the question. *Winter v. Hollingsworth Properties, Inc.*, 777 F.2d 1444 (11th Cir.1985); *Nargiz v. Henlopen Developers*, 380 A.2d 1361 (Del. 1977); *Appalachian, Inc. v. Olson*, 468 So.2d 266 (Fla. 2d DCA 1985); *Orpheus Investments v. Kyegon Investments*, 447 So.2d 257 (Fla. 3d DCA 1983); *Hamptons Development Corporation of Dade v. Sackler*, 522 So.2d 1035 (Fla. 3d DCA 1988); *N&C Properties v. Pritchard*, 525 So.2d 1346 (Ala. 1988), cert. den'd ___ U.S. ___, ___ L.Ed.2d ___, 109 S.Ct. 146 (1988); see also, Andrew J. Markus, Application of Interstate Land Sales Full Disclosure Act to Condominiums, *Real Property, Probate and Trust Journal*, Vol. 22, No. 1, p. 41 (1987). As in almost every other reported case involving the Act, its application was determined on a motion for summary

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[2] Petitioners do not contend that this regulation is unconstitutional or that its promulgation was beyond the power of the agency charged with administering the Act, the Secretary of Housing and Urban Development.

judgment. *Schatz v. Jockey Club Phase III, Ltd.*, 604 F.Supp. 537 (S.D. Fla. 1985); *Grove Towers, Inc. v. Lopez*, 467 So.2d 358 (Fla. 3d DCA 1985); *Dorchester Development, Inc. v. Burk*, 439 So.2d 1032 (Fla. 3d DCA 1983); *Finst Dev., Inc. v. Bemaor*, 449 So.2d 292 (Fla. 5 DCA 1984); *Winter, supra; Nargiz, supra.*

The Condominium Declaration (the "Declaration") filed and recorded with the Eagle County Clerk and Recorder by the petitioners stated that the project was divided into 141 condominiums, each of which carried *exclusive* rights to possession and ownership. Although in connection with a wholly separate claim for relief, respondent had alleged in his complaint that the parking units in the project were not merchantable because they were not statutory condominiums under Colorado law, petitioners consistently denied in the trial court and before the Colorado Court of Appeals that the parking units being marketed were anything other than statutory condominiums. Petitioners submitted no evidence by way of affidavit or otherwise which made such question a material issue. Only in petitioning the Colorado Supreme Court for discretionary review did petitioners for the first time state that the parking units were not condominiums. By the time they filed such petition in the Colorado Supreme Court, petitioners' interest as developer of the project had ended as a result of the voluntary bankruptcy petition filed by the petitioner-partnership. Petitioners' explanation why condominiumization of the parking units was attempted finds no support in the record and has never been addressed to any of the lower courts. Rather than arguing that the parking units were not condominiums, petitioners defended on the ground that

the project was exempt from the registration requirements imposed by the Act under one of four exemptions among the several statutory and administrative exemptions available. The four exemptions selected and relied upon by the petitioners were inconsistent with each other.

The Colorado Court of Appeals correctly ruled that whether the parking units were or were not condominiums was not essential to a resolution of this action. The question was whether those parking units were "lots" as administratively defined above. The parking units were marketed by petitioners and sold as condominium units; discrete interests for which at least one purchaser, the respondent, was to be charged an additional $15,000.00. There was no requirement that one own a residential or commercial unit within the project in order to purchase a parking unit. The Declaration provided that each owner of a parking unit would be entitled to the "exclusive ownership and possession of his Condominium." "Condominium", as defined by the petitioners in the Declaration which they drafted, and a copy of which they provided to respondent contemporaneously with his payment of the earnest money deposit, included parking units.

Application of uniformly interpreted law to these undisputed facts does not pose any significant change for real estate development. The Act has been law for over 20 years. Petitioners seemingly fail to understand that the Act does not apply to interests that are built and which therefor exist when marketed or to presales when the developer unconditionally guarantees completion within two years and gives the purchaser a right to specific performance. The Act does apply in circumstances where,

as here, the developer presells an interest in real property to be created in the future, takes the purchaser's earnest money and is not required to hold it in escrow or trust, makes no absolute promise about completion and contractually denies the purchaser any right to specific performance.

There is, after all, no real difference between the sale of undeveloped raw land to be improved in the future and the sale of condominiums which have yet to be constructed; both involve significant developer promises. Under these circumstances, the Act is very simple in its application. If the developer chooses not to comply with the disclosure requirements, the Act grants the purchaser a right to get his earnest money deposit back. The Act as written and uniformly interpreted grants the consumer only the protection which the developer in the first instant has chosen to deny.

II. Petitioners' Naked Allegations Of Bias Or Prejudice Against Them By A State Court Judge Are Not Sufficient Constitutionally To Require Disqualification.

Petitioners' argument that the Due Process Clause is triggered "whenever" the action of a state court judge in failing to recuse himself falls below the stated standard misapprehends the law. Rather, this Court has recognized that:

> it is normally within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be

ranked as fundamental. *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

The principle of deference to the states and their administration of their own courts was amplified in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), where this Court held that "[c]ertainly only in the most extreme of cases would disqualification on [the basis of bias or prejudice] be constitutionally required." *Aetna, supra*, at 821. "[M]atters of kinship, personal bias, state policy, remoteness of interest, would seem to be matters merely of legislative discretion." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

When petitioners initially raised the issue of bias in a motion filed ten days before oral argument in the Colorado Court of Appeals,[3] that court remanded to the trial court with directions that it consider the allegations and apply the considerable body of Colorado law that has developed on the question of recusal. *Johnson v. District Court*, 674 P.2d 952 (Colo. 1984); *Zoline v. Telluride Lodge Association*, 732 P.2d 635 (Colo. 1987); *People v. Botham*, 629 P.2d 589 (Colo. 1981); *Litinsky v. Querard*, 683 P.2d 816 (Colo.App. 1984).

The petitioners' allegation is that in ruling on respondent's Motion for Summary Judgment the trial judge was

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[3] Petitioners have never asserted below that "retroactive" recusal was required by the Due Process Clause of the U.S. Constitution. Rather, they have relied upon state law which has developed on this question. On this basis alone, respondent questions the jurisdiction of this Court to review the rulings below.

prejudiced against the mother of two of the named parties, who also had a remote, unapparent limited partnership interest in one of the defendants. Not only was the mother's interest nowhere apparent in the record, her name appeared in no document before the court and she was not a named party. Petitioners do not assert that the trial judge had actual knowledge of the mother's interest in the partnership; only that he should have gone outside of the record and himself independently searched the real property records for the whole of the county in which the project was located.[4]

Not only was this argument unanimously rejected by the Colorado Court of Appeals, no member of the Colorado Supreme Court voted to review this determination. Under these circumstances there can be no real contention of even the appearance of impropriety.

It must be remembered that the action of the trial court under review was the propriety of its ruling on respondent's Motion for Summary Judgment. The trial court was called upon only to apply the law to the material facts which the parties admitted were not in dispute. Indeed, almost all of the facts were established by documents drafted by the petitioners. The trial court was in no position to exercise bias or prejudice as it was not required to find or determine any genuine, disputed issue of material fact. Rather, the trial court applied uniformly interpreted law which no reviewing court has found to be other than correct and proper.

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[4] Petitioners have not stated why the U.S. Constitution limits the required search only to one county.

Finally, petitioners argue that this matter should be reviewed because of the confidential nature of Colorado's judicial disciplinary system. Petitioners do not contend that the system is constitutionally infirm and did not address the sufficiency of the system in the lower courts. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. ___, 100 L.Ed.2d 62, 108 S.Ct. 1645 (1988).

CONCLUSION

For these reasons, respondent Manuel Benet Giralt aka Manuel Benet respectfully prays that petitioners' Petition for Writ of Certiorari be denied.

Dated this 21 day of December, 1988.

Respectfully submitted,

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